Supreme Court, U.S.
FILED
071141 MAR 4 - 2008
OFFICE OF THE CLERK

No. 1

IN THE

Supreme Court of the United States

DAVID R. J. DONOVAN,
Petitioner,

v.

ARIANA CAPLAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

THOMAS T. WORBOYS
Counsel of Record
ROBERT H. FLYNN
FLYNN LAW FIRM, P.C.
27 Mica Lane
Wellesley, Mass. 02481
(781) 239-1005

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment forbids a state court from ordering prohibitory injunctive relief without personal jurisdiction over the party to be enjoined.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 1

A. Factual Background 3

B. Proceedings Below 4

REASONS FOR GRANTING THE PETITION 6

I. AN INCREASING NUMBER OF STATE COURTS ARE RULING THAT PERSONAL JURISDICTION IS NOT REQUIRED TO ISSUE A PROHIBITORY INJUNCTION 6

A. The Iowa Supreme Court 7

B. The New Jersey Supreme Court 8

C. The Court of Appeals of Kentucky 10

D. The Supreme Judicial Court of the Commonwealth of Massachusetts 10

TABLE OF CONTENTS – Continued

II. THE STATE COURT RULINGS RAISE SERIOUS FEDERAL CONSTITUTIONAL CONCERNS AND CONFLICT WITH FEDERAL LAW 12

A. Prohibitory Injunctions Issued on the Basis of "Protected Status" Contravene the Fourteenth Amendment's Guarantee of Due Process 14

B. The Violence Against Women Act of 1994 Compels Every State to Adopt and to Enforce a Prohibitory Injunction Issued on the Basis of "Protected Status" 19

C. The Brady Handgun Violence Prevention Act of 1993 Subjects the Recipient of a Prohibitory Injunction Issued on the Basis of "Protected Status" to Criminal Liability 21

CONCLUSION 23

APPENDIX

Opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts (January 17, 2008) 1a

TABLE OF AUTHORITIES

Page

CASES

Atherton v. Atherton,
181 U.S. 155 (1901) 17

Baker v. Baker, Eccles & Co.,
242 U.S. 394 (1917) 21

Bartsch v. Bartsch,
636 N.W.2d 3 (Iowa 2001) 7, 8

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) 16

Burnham v. California Superior Court,
495 U.S. 604 (1990) 3, 7, 15, 16

Estin v. Estin,
334 U.S. 541 (1948) 18

Gonzalez v. Raich,
545 U.S. 1 (2005) 19

Haddock v. Haddock,
201 U.S. 562 (1906) 17

Hanson v. Denckla,
357 U.S. 235 (1958) 15

Helicopteros Nacionales de Columbia v. Hall,
466 U.S. 408 (1984) 16

TABLE OF AUTHORITIES – Continued

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 18

Int'l Shoe v. Washington,
326 U.S. 310 (1945) 3, 13, 14, 15

Kulko v. California Superior Court,
436 U.S. 84 (1978) 8, 11, 14, 15

Louis Vuitton Malletier v. Dooney & Bourke, Inc.,
454 F.3d 108 (2d Cir. 2006) 2

Maryland v. Louisiana,
451 U.S. 725 (1981) 19

May v. Anderson,
345 U.S. 528 (1953) 21

McCulloch v. Maryland,
4 Wheat. 316 (1819) 19

Milliken v. Meyer,
311 U.S. 457 (1940) 12, 14

NBA Properties, Inc. v. Gold,
895 F.2d 30 (1st Cir. 1990) 2

Pennoyer v. Neff,
95 U.S. 714 (1877) 7, 11, 15, 17

Rush v. Savchuk,
444 U.S. 320 (1980) 16

TABLE OF AUTHORITIES – Continued

Shaffer v. Heitner,
433 U.S. 186 (1977) 11, 14, 15, 16

Shah v. Shah,
184 N.J. 125 (2005) 8, 9

Spencer v. Spencer,
191 S.W.3d 14 (Ky. App. 2006) 10

T.L. v. W.L.,
820 A.2d 506 (Del.Fam.Ct. 2003) 12

United States v. Calor,
340 F.3d 428 (6th Cir. 2003) 22

United States v. Emerson,
270 F.3d 203 (5th Cir. 2001) 22

United States v. Wilson,
159 F.3d 280 (7th Cir. 1998) 22

United States v. Young,
458 F.3d 998 (9th Cir. 2006) 22

Vanderbilt v. Vanderbilt,
354 U.S. 416 (1957) 18

Williams v. North Carolina,
317 U.S. 287 (1942) 7, 11, 17

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 16

TABLE OF AUTHORITIES – Continued

CONSTITUTIONS

Art. IV, Sec. 1, U.S. Const. 20

Art. VI, cl. 2, U.S. Const. 19

Amend. XIV, U.S. Const. ..... *passim*

STATUTES

18 U.S.C. § 922(g)(8) 22

18 U.S.C. § 2265 ..... 20, 21

18 U.S.C. § 2266 20

28 U.S.C. § 1257(a) 1

MISCELLANEOUS

42 Am.Jur.2d Injunctions, § 4 2

Black's Law Dictionary (7th Ed. 1999) 2

Restatement (Second) of Judgments § 7 (1982) 18

OPINIONS BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts, App., *infra*, 1a-16a, is reported at 450 Mass. 463 and 879 N.E.2d 117.

JURISDICTION

The Supreme Judicial Court, the highest court of the Commonwealth of Massachusetts in which a decision could be had, rendered judgment on January 17, 2008. As the petitioner claimed a right and privilege arising under the Fourteenth Amendment to the Constitution of the United States in the matter below, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fourteenth Amendment to the Constitution of the United States provides, in part relevant to this petition, that "[n]o State shall [...] deprive any person of life, liberty, or property, without due process of law." Amend. XIV, U.S. Const.

STATEMENT OF THE CASE

The Supreme Judicial Court of the Commonwealth of Massachusetts is the most recent of four state courts to approve of injunctive relief in the context of a protective order, notwithstanding the absence of personal jurisdiction over the party to be enjoined.

In its ruling, the Massachusetts high court followed decisions of the courts of Iowa, New Jersey and Kentucky holding that, because a state can adjudicate the marital and parental status of its domiciliaries without personal jurisdiction over the absent spouse or parent, a state may confer a "protected status" upon a resident. This "protected status", it was reasoned, permits prohibitory injunctive[1] relief to be afforded against a nonresident, without regard to personal jurisdiction, on account of a purported exception to the Due Process Clause of the Fourteenth Amendment.

In spite of the Supreme Judicial Court's characterization of the proceedings as a declaration of the resident plaintiffs "status", its only undertaking was to direct injunctive relief against the nonresident defendant. Also notwithstanding its position that the order was constitutional for the reason that it did not impose a "personal obligation or duty" upon the defendant, the Supreme Judicial Court's conclusion is at impossible odds with over six

---

[1] As compared to mandatory injunctions that "require positive action involving a change of existing conditions by the doing or undoing of an act", prohibitory injunctions "require[ ] a party to desist from doing certain acts in order to preserve the status quo." 42 Am.Jur.2d Injunctions, § 4; *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006), *quoting* Black's Law Dictionary, 788 (7th Ed. 1999) (a prohibitory injunction "forbids or restrains an act"); *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 33 (1st Cir. 1990) (prohibitory injunctions become "mandatory" injunctions when they "impose[ ] an affirmative obligation").

decades of this Court's jurisprudence. On top of that, by operation of federal law, such a prohibitory injunction subjects the recipient thereof to criminal liability and compels all states to afford full faith and credit thereto.

Because only state courts issue orders of this nature, this Court is the only federal court that, in any likelihood, will ever have the opportunity to review the due process implications of such proceedings.[2] What is certain is that, left undisturbed, the judgment of the Supreme Judicial Court will encourage more state courts to exceed the jurisdictional limitations imposed by the Fourteenth Amendment.

A. Factual Background

In 2000, the petitioner, David R. J. Donovan, and the respondent, Ariana Caplan, began a romantic relationship in the Commonwealth of Massachusetts. In 2002, they moved from Massachusetts to the State of Florida, where a son was born on February 24, 2004.

On or about May 14, 2006, an incident between the parties brought about an end to the relationship and resulted in the respondent moving to

---

[2] "For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether 'traditional notions of fair play and substantial justice' have been offended." *Burnham v. California Superior Court*, 495 U.S. 604, 622 (1990), *quoting Int'l Shoe v. Washington*, 326 U.S. 310, 316 (1945).

Massachusetts along with her son on Monday, June 5, 2006.

B. Proceedings Below

On Wednesday, June 7, 2006, the respondent filed a complaint for protection from abuse in the District Court Department of the Trial Court of the Commonwealth of Massachusetts. After an *ex parte* hearing on Friday, June 9, 2006, a restraining order issued against the petitioner awarding custody of the child to the respondent and directing the petitioner (a) not to abuse or to contact the respondent, (b) to stay away from the respondent's residence in Massachusetts, (c) not to contact the child, (d) to pay civil damages and (e) to surrender all firearms, ammunition and gun licenses.

The Marion County Sheriff's Department served the petitioner with the restraining order at his place of business in Ocala, Florida on Tuesday, June 13, 2006. In compliance with the order, the petitioner surrendered his firearms and ammunition later that day.

On Monday, June 19, 2006, the District Court held a further hearing to determine whether the restraining order should be extended for one year. As it was not possible for the petitioner to travel from Florida to Massachusetts on six days' notice, he retained counsel to appear on his behalf. At the June 19 hearing, the petitioner's counsel moved to dismiss the matter on the grounds that Massachusetts long-arm statute contained no provision permitting the

exercise of personal jurisdiction over the petitioner and that the exercise of personal jurisdiction violated the petitioner's Fourteenth Amendment due process rights. The following day,[3] the District Court denied the petitioner's motion to dismiss.[4]

The Supreme Judicial Court rendered its appellate ruling on January 17, 2008. Although recognizing that it did not have personal jurisdiction over the petitioner, it nonetheless affirmed the no-contact and stay-away portions of the order in reliance upon a "status exception to the personal jurisdiction ordinarily required by due process". App., *infra*, 10a. It was accordingly determined that "an order that is appropriately limited to prohibitions that relate to the protected status of a person within the Commonwealth does not violate the due process rights of a nonresident defendant just because it issues without personal jurisdiction over that defendant." *Id.*, 13a.

The firearm surrender and money damages portions of the order, however, were vacated for the reason that they imposed an "affirmative duty". *Id.*,

---

[3] Although the jurisdictional issue was taken under advisement, the District Court ruled from the bench that because it had "heard from [the respondent] twice" and found her testimony to be credible, whereas all it had from the petitioner was "his assertion through an affidavit that he didn't do the acts", if it found that it had jurisdiction to do so, the District Court would extend the restraining order for one year.

[4] On Wednesday, June 21, 2006, the petitioner filed his notice of appeal. Oral arguments were held on November 8, 2007.

15a. Even so, the Supreme Judicial Court disregarded the petitioner's argument that the mere existence of the restraining order imposed the affirmative duty to surrender his firearms or become subject to criminal liability under the Brady Handgun Violence Prevention Act of 1993. To boot, the decision of the Supreme Judicial Court has been arguably foisted upon each state, commonwealth, territory and possession of the United States as *per* the provisions of the Violence Against Women Act of 1994.

These important questions of federal law and national concern have not yet been, but should be, settled by the Court.

REASONS FOR GRANTING THE PETITION

I

AN INCREASING NUMBER OF STATE COURTS ARE RULING THAT PERSONAL JURISDICTION IS NOT REQUIRED TO ISSUE A PROHIBITORY INJUNCTION

The Supreme Judicial Court relied upon rulings of the courts of Iowa, New Jersey and Kentucky that approved of injunctive relief against absent nonresident defendants in the context of a protection order notwithstanding a lack of personal jurisdiction. Although this Court has cautioned that new judicial procedures cannot offend traditional notions of fair

play and substantial justice mandated by the Fourteenth Amendment, *Burnham v. California Superior Court*, 495 U.S. at 622, this admonition has gone, and apparently will continue to go, unheeded.

A. The Iowa Supreme Court

In 2001, the Iowa Supreme Court became the first court in the nation to hold that an injunctive restraining order may be directed against an absent nonresident defendant in the absence of personal jurisdiction. In doing so, the Iowa Supreme Court relied upon the power of a state "to determine for itself the civil status and capacities of its inhabitants". *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877). Because, the Iowa Supreme Court reasoned, a state may alter the marital status of a person notwithstanding the absence of the other spouse, *Williams v. North Carolina*, 317 U.S. 287, 298-299 (1942), and that the state interest in protecting victims of domestic abuse was greater than the state interest in dissolving marriages, the "protected status established by [the Iowa domestic abuse] statute [wa]s sufficient to justify [a] court in exercising jurisdiction". *Bartsch v. Bartsch*, 636 N.W.2d 3, 9 (Iowa 2001).

In essence, the Iowa Supreme Court employed a balancing test to rule that a state statute outweighed the Fourteenth Amendment. The majority, having no constitutional support for such a ruling, stated, in *dicta*, that:

> If a court may constitutionally make orders affecting marriage, custody, and parental rights without personal jurisdiction of a defendant, it certainly should be able to do what the court did here - enter an order protecting a resident Iowa family from abuse.

Bartsch v. Bartsch, 636 N.W.2d at 10.[5]

B. The New Jersey Supreme Court

Four years later, the New Jersey Supreme Court considered the propriety of a restraining order directed at a "[d]efendant [who] has never set foot in New Jersey, either literally or figuratively." *Shah v. Shah*, 184 N.J. 125, 133 (2005). Although explicitly not relying upon the reasoning of *Bartsch v. Bartsch*, *supra*, at 139 n. 5 ("We are unpersuaded by the 'status exception' cases [the amicus party] claims permit the assertion of personal jurisdiction over [a] defendant in these circumstances."), the New Jersey Supreme Court nonetheless drew the same

---

[5] The ruling incurred a sharp dissent by three justices who pointed out that the only judicial act undertaken to establish the "protected status" was "a grant of injunctive relief against a party beyond the jurisdiction of the Iowa court". *Id.*, at 11. Appreciating that "[t]he Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants", *Kulko v. California Superior Court*, 436 U.S. 84, 91 (1978), the dissent emphasized that there had been "a direct invasion of [the defendant's] liberty interest [and] collateral consequences of a lasting nature." *Bartsch v. Bartsch*, 636 N.W.2d at 11 (Carter, J., dissenting).

distinction between prohibitory and affirmative relief and concluded that prohibitory relief may be afforded against a nonresident defendant, sans personal jurisdiction:

> [T]he entry of an order prohibiting acts of domestic violence against a defendant over whom no personal exists, is addressed not to the defendant but to the victim: it provides the victim the very protection the law specifically allows, and it prohibits the defendant from engaging in behavior[6] already specifically outlawed.

Id., at 138.[7]

---

[6] The New Jersey Supreme Court's logic is markedly flawed. An order that "prohibits the defendant from engaging in behavior" is obviously an injunction directed to the defendant, not "to the victim".

[7] Bearing in mind that it could not enter a permanent injunction within the constitutional confines of *International Shoe*, the New Jersey Supreme Court instead elected to extend a temporary restraining order *ad infinitum*, likened the defendant to "the incarcerated civil contemnor who carries the keys to freedom in his willingness to comply with the court's directive" and decreed that the defendant "can either come into New Jersey and substantively defend against the domestic violence complaint, or he can request that both matters - the divorce action and the domestic violence complaint - be heard in [his state of domicile] and seek a resolution favorable to him there." *Shah v. Shah*, 184 N.J. at 139, 141-142. *Shah v. Shah*'s demand of submission to jurisdiction in one way or another stands as a prime example of the need for the Court's review of this expansive concept of state court jurisdiction.

C. The Court of Appeals of Kentucky

The Commonwealth of Kentucky followed both the Iowa and New Jersey rulings in *Spencer v. Spencer*, 191 S.W.3d 14 (Ky. App. 2006). In that decision, the Court of Appeals of Kentucky adopted the aforesaid balancing tests and, after suggesting that "the issuance of a prohibitory order does not implicate any of defendant's [sic] substantive rights", *id.*, at 18, it determined that "the distinction [...] between prohibitory and affirmative orders represents the fairest balance between protecting the due process rights of the nonresident defendant and the state's clearly-articulated interest in protecting the plaintiff and her child against domestic violence." *Id.*, at 19.

D. The Supreme Judicial Court of the Commonwealth of Massachusetts

In the matter for which a writ of certiorari is presently sought, the Supreme Judicial Court of the Commonwealth of Massachusetts likewise approved of prohibitory injunctive relief against an absent nonresident defendant. Although admitting that the petitioner's contacts with Massachusetts did not give rise to personal jurisdiction, the Supreme Judicial Court opined, based upon an "exception" to the Fourteenth Amendment, that the lack of personal jurisdiction "does not end the inquiry." App., *infra*, 9a.

Relying on the power of a state to "authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be

binding within the State", *Pennoyer v. Neff*, 95 U.S. at 734 (emphasis in original), and that such power includes the authority to "alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent", *Williams v. North Carolina*, 317 U.S. at 298-299, it was reasoned that the prohibitory injunction "serves a role analogous to custody or marital determinations, except that the order focuses on the plaintiff's protected status rather than her marital or parental status." App., *infra*, 10a.

After citing to the Iowa, New Jersey and Kentucky rulings in support of this novel principle, the Supreme Judicial Court still, however, acknowledged that a "prohibitory abuse prevention order admittedly is not the same as a status determination made in custody or divorce cases because, while the orders in such cases principally focus on the plaintiff, an abuse prevention order is primarily addressed to the defendant."[8] *Id.*, 13a.

Notwithstanding the Fourteenth Amendment's check on state court jurisdiction over nonresident defendants, *Kulko v. California Superior Court*, 436 U.S. at 91; *Shaffer v. Heitner*, 433 U.S. 186, 198-200

---

[8] In fact, the "prohibitory abuse prevention order", App., *infra*, 13a, was addressed entirely to the petitioner; no judicial determination of the respondent's "status" was ever made. This pigeonholing of the injunction as a declaration of "status" is a *post hoc* characterization to excuse the issuance of an injunction against a Florida resident in the absence of personal jurisdiction.

1977), the Supreme Judicial Court held that so long as there is notice and a hearing, *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), a nonresident defendant's due process rights are satisfied so long as the order "is appropriately limited to prohibitions that relate to the protected status of a person within the Commonwealth". App., *infra*, 13a.

II

THE STATE COURT RULINGS RAISE SERIOUS FEDERAL CONSTITUTIONAL CONCERNS AND CONFLICT WITH FEDERAL LAW

There is little doubt that more state courts will adopt these decisions to expand their jurisdictional reach.[9] This Court's review of the use of a "status exception" to the Due Process Clause of the Fourteenth Amendment is urgently needed before it ceases to be an exception and absorbs the rule. As detailed, *infra*, state public policy always must yield to the mandates of any liberty interest guaranteed by the Constitution of the United States.

Quintessentially, the Supreme Judicial Court has avered, like the courts of Iowa, New Jersey and

---

[9] To date, only the Family Court of Delaware has rejected the constitutionality of a due process "exception" to an award of prohibitory injunctive relief. *T.L. v. W.L.*, 820 A.2d 506 (Del.Fam.Ct. 2003).

Kentucky before it, that its jurisdiction over a domiciled plaintiff, at least in the context of a protective order, permits prohibitory injunctive relief to be afforded against a nonresident defendant, even in the absence of personal jurisdiction, so long as the injunction does not impose a "personal obligation or duty". *Int'l Shoe v. Washington*, 326 U.S. at 316. Aside from the fact that the prohibitory injunction unquestionably imposed a personal obligation and duty upon the petitioner, the award of injunctive relief against a nonresident in the absence of personal jurisdiction is inconsistent with this Court's precedent concerning the limitations imposed upon state jurisdiction by the Due Process Clause.

Additionally, in reliance upon the jurisdictional limitations of states delineated by the Court, Congress has enacted laws presupposing that state courts respect those limitations. Now that those limitations have been exceeded, the rulings of the courts of Iowa, New Jersey, Kentucky and Massachusetts potentially have been imposed upon every other state, commonwealth, territory and possession of the United States by operation of federal law.

Finally, the onus of "status based" injunctive relief in the absence of personal jurisdiction subjects the nonresident recipients of such orders to federal criminal liability which has been held by some Circuits to be unassailable on the basis of a due process violation pertaining to the underlying injunction.

A. Prohibitory Injunctions Issued on the Basis of "Protected Status" Contravene the Fourteenth Amendment's Guarantee of Due Process.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides that "[n]o State shall [...] deprive any person of life, liberty, or property, without due process of law". In addition to the bare minimum of reasonable notice and an opportunity to be heard,[10] *see Milliken v. Meyer*, 311 U.S. at 463 (1940), the Due Process Clause requires that any judgment "imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant." *Int'l Shoe v. Washington*, 326 U.S. at 316. The Fourteenth Amendment thereby "operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants", *Kulko v. California Superior Court*, 436 U.S. at 91, *citing Shaffer v. Heitner*, 433 U.S. at 198-200, which requires "a sufficient connection between the defendant and the forum State to make it fair to require defense of the action in the forum." *Id., citing Milliken v. Meyer*, 311 U.S. at, 463-464 (1940);

---

[10] In this instance, it was held that six days' notice to travel from Florida to Massachusetts satisfied due process because the petitioner secured an attorney to appear on his behalf. App., *infra*, 15a. The Supreme Judicial Court does not acknowledge that the petitioner's absence actually caused him to lose on the merits of the matter. *See* n. 3, *supra*.

Hanson v. Denckla, 357 U.S. 235, 253 (1958). Consequently, no court may award relief[11] against a nonresident in the absence of personal jurisdiction. *Id., citing Pennoyer v. Neff*, 95 U.S. at 732-733 (1878); *Int'l Shoe v. Washington*, 326 U.S. at 316.

Deviations from the rules of jurisdiction applied in the Nineteenth Century[12] are permissible "only with respect to suits arising out of the absent defendant's contacts with the state." *Burnham v. California Superior Court*, 495 U.S. at 609-610. Since

---

[11] In *Kulko v. California Superior Court*, the Court, in the context of a child support order, took into consideration a state's "substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children", and concluded that:

> These interests simply do not make [a State] a "fair forum" in which to require [a nonresident defendant], who derives no personal or commercial benefit from his child's presence in [the State] and who lacks any other relevant contact with the State, either to defend a child-support suit or to suffer liability by default.

Id., 436 U.S. at 100-101, *quoting Shaffer v. Heitner*, 433 U.S. at 215.

[12] The Court has limited these jurisdictional grounds to the "well-established principles of public law respecting the jurisdiction of an independent State over persons and property", *Pennoyer v. Neff*, 95 U.S. at 722, and the defendant's physical presence within the state at the time process is served. *Burnham v. California Superior Court*, 495 U.S. at 619, 621 ("[I]ts validation is its pedigree, as the phrase '*traditional notions* of fair play and substantial justice' makes clear.") (Scalia, J., emphasis in original).

International Shoe, a "minimum contact" with the forum state also satisfies due process, so long as that contact specifically relates to[13] the subject matter of the litigation. *Shaffer v. Heitner*, 433 U.S. at 204; *Rush v. Savchuk*, 444 U.S. 320, 329 (1980). However, the general rule remains that an assertion of personal jurisdiction is permissible under the Fourteenth Amendment only where a defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[14] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).

None of the foregoing case law is to be found in the Supreme Judicial Court's opinion. Instead, the Massachusetts high court undercut all precedent on

---

[13] Although "continuous and systematic" contacts by a corporation supports jurisdiction "[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State", *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984), this rule "applies *only* to corporations", not to individuals. *Burnham v. California Superior Court*, 495 U.S. at 610 n. 1 (emphasis in original).

[14] By requiring that individuals have "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign", *Shaffer v. Heitner*, 433 U.S. at 218 (Stevens, J., concurring), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

the matter by asserting that, in ordering injunctive relief against the petitioner, it was simply making a "status" determination of the respondent. Although a state may adjudicate the marital or parental status of those domiciled within its borders, *Williams v. North Carolina*, 317 U.S. at 298-299, the Supreme Judicial Court could have not reasonably relied upon *Williams v. North Carolina* to engineer a "protected" status, and it certainly could not have understood *Williams v. North Carolina* to approve of injunctive orders against persons beyond a state court's jurisdictional reach.

Haddock v. Haddock, 201 U.S. 562 (1906), held that a divorce proceeding was one *in personam*,[15] and that while full faith and credit to the divorce could not, therefore, be afforded by the other states if the divorce issued without personal jurisdiction over both spouses, the divorce was valid within the one state due to the inherent power of a state "to determine for itself the civil status and capacities of its inhabitants". *Pennoyer v. Neff*, 95 U.S. at 722. *Williams v. North Carolina* overturned *Haddock v. Haddock* and held that a divorce was indeed to be afforded full faith and credit due to "intensely practical considerations" concerning bigamy and the bastardization of children. *Williams v. North Carolina*, 317 U.S. at 301, *quoting Haddock v.*

[15] *Haddock v. Haddock* overturned *Atherton v. Atherton*, 181 U.S. 155 (1901), which held that a divorce proceeding was one *in rem* over the marriage itself. *Id.*, at 162-163, *citing Pennoyer v. Neff*, 95 U.S. at 734.

Haddock, 201 U.S. at 628 (Holmes, J., dissenting). No such considerations are present in the conferring of a "protected status".

Even assuming, *arguendo*, that a court is, in fact, free to confer a "protected status" upon a domiciliary, it is beyond clear that such a "status" may not be effected through an award of relief against a nonresident in the absence of personal jurisdiction. *Estin v. Estin*, 334 U.S. 541, 544 (1948) (determination of civil status does not extend to jurisdiction to modify support order); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957) ("It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant."); *see also* Restatement (Second) of Judgments § 7 cmt. a (1982) ("Jurisdiction to establish or terminate a status should be distinguished from jurisdiction to determine the existence of a status as an incidental question in litigation whose primary objective is resolution of some other controversy."). No matter how the procedure was characterized, the Supreme Judicial Court deprived the petitioner of an essential liberty interest without due process of law. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) ("The personal jurisdiction requirement recognizes and protects an individual liberty interest.").

Although the Supreme Judicial Court emphasized that the prohibitory injunction "furthers the Commonwealth's important public policy goal of

securing the fundamental human right to be protected from the devastating impact of family violence", App., *infra*, 11a (internal citations omitted), the error remains plain. No state law, policy, goal or other interest may ever be balanced against and outweigh the Constitution of the United States. Art. VI, cl. 2, U.S. Const. The Due Process Clause, like every part of the Constitution, may not be abrogated by a state's interest, no matter "how legitimate or dire" that state interest may be. *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), *citing McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819). No state interest may be so broad as to eclipse the Constitution of the United States, and the ruling of the Supreme Judicial Court should be reviewed and reversed.

B. The Violence Against Women Act of 1994 Compels Every State to Adopt and to Enforce an Injunction Issued on the Basis of "Protected Status".

The Supreme Judicial Court also defended its judgment as inoffensive to the Fourteenth Amendment by characterizing the injunction as "an order that is appropriately limited to prohibitions that relate to the protected status of a person within the Commonwealth". App., *infra*, 13a. All the same, the Supreme Judicial Court neglected to recognize

that its ruling was not jurisdictionally limited "to provid[ing] protection to those within its borders", *id.*, 11a, for the reason that every state, commonwealth, territory and possession of the United States is now debatably compelled by operation of federal law to enforce the Massachusetts injunction *in toto*.

The Violence Against Women Act requires that protection orders[16] "shall be accorded full faith and credit by the court of another State, Indian tribe or territory [...] and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory[17] as if it were the order of the enforcing State or tribe." 18 U.S.C. § 2265(a); Art. IV, Sec. 1, U.S. Const. Unquestionably, the Supreme Judicial Court did not implement adequate safeguards to limit its reach to the borders of Massachusetts, and that omission gives rise to the problematic inquiries of whether the Commonwealth of Massachusetts successfully expanded its jurisdictional grasp, and if so, to what extent.

Although both the text of the Violence Against Women Act and the Court's jurisprudence on the

---

[16] Protection orders are defined, in relevant part, as "any injunction, restraining order, or any other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence, or contact or communication with or physical proximity to, another person". 18 U.S.C. § 2266(5)(A).

[17] Capitalization of the word "Territory" is in the original text.

matter indicate that a state would stand on solid ground in refusing to afford full faith and credit to a prohibitory injunction issued without personal jurisdiction over the recipient,[18] the Court's review of this conundrum is the only apposite panacea.

C. The Brady Handgun Violence Prevention Act of 1993 Subjects the Recipient of a Prohibitory Injunction Issued on the Basis of "Protected Status" to Criminal Liability.

While the portion of the prohibitory injunction requiring the petitioner to surrender his firearms was vacated as imposing a "personal obligation or duty" and consequently offending the Due Process Clause, the vacating of that portion of the order was a legal nullity. A personal obligation was still imposed upon the petitioner to surrender his

---

[18] Under the full faith and credit provisions of the Violence Against Women Act, a protection order by a court is to be afforded full faith and credit only if "such court has jurisdiction over the *parties*". 18 U.S.C. § 2265(b)(1) (emphasis supplied). Any reading of the statute to include a "status based" protective order, wherein personal jurisdiction over the party to be enjoined was absent, would stand at impossible odds with the Court's precedent. *May v. Anderson*, 345 U.S. 528, 533 (1953), *quoting Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 401 (1917) ("It is now too well settled to be open to further dispute that the 'full faith and credit' clause and the act of Congress passed pursuant to it do not entitle a judgment *in personam* to extraterritorial effect if it be made to appear it was rendered without jurisdiction over the person sought to be bound.").

property or become subject to criminal liability. 18 U.S.C. § 922(g)(8).

Even more troublesome is the fact that if the recipient of a "status based" prohibitive injunction were to be charged for violating 18 U.S.C. § 922(g)(8), a dearth of personal jurisdiction relative to the underlying protective order may or may not be a defense thereto, due to a Circuit split on the matter. *United States v. Emerson*, 270 F.3d 203, 213 (5th Cir. 2001) ("nothing in section 922(g)(8) suggests that the validity of the particular predicate court order may be inquired into in the section 922(g)(8) criminal prosecution"); *United States v. Young*, 458 F.3d 998, 1005 (9th Cir. 2006); *cf. United States v. Wilson*, 159 F.3d 280, 289-290 (7th Cir. 1998) (due process hearing is required as to the underlying restraining order proceedings in a section 922(g)(8) prosecution); *United States v. Calor*,[19] 340 F.3d 428, 431 (6th Cir. 2003). It was obviously not Congress' intention to permit states to subject nonresidents to criminal liability through judicial acts beyond their

---

[19] In *United States v. Young*, *supra*, the Ninth Circuit articulated *United States v. Calor* as not supporting the Seventh Circuit's conclusion that a due process violation in the issuance of the underlying prevention order could be a challenge to a criminal prosecution under 18 U.S.C. § 922(g)(8). *United States v. Young*, 458 F.3d at 1004 n. 15. The import of these rulings to this petition, however, is only that the recipient of a "status based" prohibitory injunction could be subject to criminal prosecution without recourse to any defense concerning a due process violation by the court issuing the injunction.

jurisdictional reach, and the Court should review this important question of federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS T. WORBOYS
Counsel of Record
ROBERT H. FLYNN
FLYNN LAW FIRM, P.C.
27 Mica Lane
Wellesley, Mass. 02481
(781) 239-1005

MARCH 2008

Appendix A

Supreme Judicial Court of Massachusetts,

Middlesex.

Ariana CAPLAN

v.

David R.J. DONOVAN.

SJC-09923

November 8, 2007.
January 17, 2008.

Abuse Prevention. Due Process of Law, Abuse prevention, Jurisdiction over nonresident. Jurisdiction, Long-arm statute, Nonresident, Personal. District Court, Jurisdiction.

Complaint for protection from abuse filed in the Natick Division of the District Court Department on June 9, 2006.

A motion to dismiss was heard by Sarah B. Singer, J. The Supreme Judicial Court granted an application for direct appellate review.

Thomas T. Worboys for the defendant.

Pauline Quirion (Megan H. Christopher with her) for the plaintiff.

Claire Laporte & Rebekah R. Clark, for Jane Doe Inc. & another, amici curiae, submitted a brief.

Present: Marshall, C.J., Greaney, Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

BOTSFORD, J.

We consider in this case whether a Massachusetts court has jurisdiction to issue an abuse prevention order under G.L. c. 209A in favor of a plaintiff who alleges that she has fled to this State to escape the abuse of her domestic partner who remains in their home in Florida. We conclude that a court may issue such an order of prevention and protection even without personal jurisdiction over the defendant, but may not impose affirmative obligations on the defendant if there is no personal jurisdiction.

1. Background.[1] The plaintiff, Ariana Caplan, and the defendant, David Donovan, met in Massachusetts in 2000 and lived together in this State before moving to Florida in 2002. In 2004 the parties had a child. The plaintiff took the child with her on occasional vacations to Massachusetts, but the defendant never returned to the State. The plaintiff alleges that, beginning in 2004, the defendant was periodically physically abusive to her. After an incident on May 14, 2006, the plaintiff fled with their son from their home in Ocklawaha, Florida. According to the plaintiff, the defendant accused her of cheating, called her a whore, and threatened to kill her and to keep their son. He blocked the door when

---

[1] We recite the facts as they appear in the record, which consists of the plaintiff's complaint; the protective order; the transcripts of the hearings in the District Court on June 9 and June 19, 2006; the defendant's affidavit; and the Florida sheriff's return of service.

she tried to leave the room, and when she grabbed the telephone to contact the police, he ripped the telephone from her hand and threw her across the room. He again blocked the door when she attempted to leave, this time slamming his fist against the wall, punching a hole in the wall.

The plaintiff and the child arrived at her mother's house in Massachusetts on June 5, 2006, twenty days after the May 14 incident. At some time before June 7, 2006, when the plaintiff first came to court, the defendant had telephoned the plaintiff's father's house in Massachusetts, had telephoned his own friends in Massachusetts apparently trying to locate the plaintiff, and also had called the plaintiff's cellular telephone five or six times each day.[2] On June 7, the plaintiff filed a complaint in the Natick Division of the District Court Department, seeking an abuse prevention order under G.L. c. 209A. Following an ex parte hearing, a judge in that court issued an order. The order directed the defendant not to abuse the plaintiff, not to contact the plaintiff, and not to come within fifty yards of the plaintiff's residence in Natick. It also awarded custody of the parties' child to the plaintiff and ordered the defendant not to contact the child. The defendant was also ordered to surrender his firearms to the local police department in Ocklawaha, Florida. Finally, the order directed the defendant to

---

[2] The record does not indicate precisely when the defendant made any of these calls, and reveals nothing about their content.

compensate the plaintiff in an amount to be determined at a later hearing.[3] By its terms, the order was set to expire on June 19, 2006, and it set June 19 as the next hearing date.

At the hearing held on June 19, 2006, the plaintiff was present and counsel appeared on behalf of the defendant. The defendant moved to dismiss the complaint under Mass. R. Civ. P. 12(b)(2), 365 Mass. 754 (1974), for lack of personal jurisdiction and to vacate the abuse prevention order. The court denied the motion and extended the order for one year. The defendant appealed. We granted the plaintiff's application for direct appellate review. We conclude that the District Court lacked personal jurisdiction over the defendant, but that personal jurisdiction was not required for the court to issue an abuse prevention order. Accordingly, we affirm in part and reverse in part.

2. Discussion. a. Personal jurisdiction. "Generally, a claim of personal jurisdiction over a nonresident defendant presents a two-fold inquiry: (1) is the assertion of jurisdiction authorized by statute, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution? Jurisdiction is permissible only when both questions draw affirmative responses." *Good*

---

[3] The judge, however, did not set an amount that the defendant was to pay at the later hearing held June 19, 2006, or at any other time.

Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 5-6 (1979). The plaintiff argues that the court had personal jurisdiction over the defendant, and she points to § 3 (d) and (g) of the Massachusetts long-arm statute, G.L. c. 223A, as providing the statutory authorization.

Section 3 (d) does not apply in this case.[4] That provision allows the exercise of personal jurisdiction over a person who causes "tortious injury in this [C]ommonwealth by an act or omission outside this [C]ommonwealth if he ... engages in any ... persistent course of conduct ... in this [C]ommonwealth." G.L. c. 223A, § 3 (d). The plaintiff argues that tortious injury in this Commonwealth was caused by the defendant's telephone calls to the plaintiff's father and the defendant's friends in Massachusetts, and also to the plaintiff's cellular telephone.

The calls did not amount to a tortious injury in the Commonwealth sufficient to allow personal jurisdiction. The mere fact of making telephone calls, even five or six calls per day, does not by itself create a tortious injury in the Commonwealth. While telephone calls made from outside a State could

---

[4] General Laws c. 223A, § 3, provides: "A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's ... (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth."

create a tortious injury within it when the calls include threats or harassing statements, see, e.g., *Beckers v. Seck*, 14 S.W.3d 141, 143 (Mo.Ct.App.2000); *McNair v. McNair*, 151 N.H. 343, 349 (2004), the record is silent on the content of the calls at issue in this case. Even in the context of allegations of abuse, there is no basis to assume that the calls were threatening or abusive, and no evidence that the calls themselves placed the plaintiff in fear. Cf. *A.R. v. M.R.*, 351 N.J.Super. 512, 517, 520 (2002) (finding personal jurisdiction for plaintiff's restraining order against defendant when order was sought "as a result of the fear engendered by one or more of defendant's telephone calls" placed from outside State).

The plaintiff did not state expressly in her complaint or in testifying before the judge that she continued to experience emotional distress or fear stemming from the abusive incident in Florida. Even if one might reasonably infer that she did, this would not provide the "tortious injury in this [C]ommonwealth" required by § 3 (d). Although the continuing "manifestations, effects, and consequences of an out-of-State injury may be experienced in Massachusetts, they do not constitute 'injury in this commonwealth' within the meaning of § 3 (d)." *Cunningham v. Ardrox, Inc.*, 40 Mass.App.Ct. 279, 282 (1996). Compare *Crocker v. Hilton Int'l Barb., Ltd.*, 976 F.2d 797, 799-800 (1st Cir.1992) (no personal jurisdiction over defendant because tortious injury to which § 3 [d] refers and on which plaintiffs'

claims were based was sexual assault that occurred at defendant's Barbados hotel; posttrauma injuries experienced on return to Massachusetts were "manifestations or effects of that injury"), with *Darcy v. Hankle*, 54 Mass.App.Ct. 846, 850-852 (2002) (emotional and economic injuries suffered by plaintiff when contacted in Massachusetts by police as result of out-of-State defendant's wrongfully initiated New York criminal proceeding against him constituted "tortious injury [occurring] in this [C]ommonwealth," supporting personal jurisdiction over defendant under § 3 [d]).[5] Any continued fears or emotional distress that the plaintiff experienced in Massachusetts would qualify as "[m]anifestations, effects, and consequences" of the injury she suffered in Florida and then transported to Massachusetts, not injuries created in the Commonwealth. *See Cunningham v. Ardrox, Inc., supra.*

Nor does § 3 (g) supply a basis for personal jurisdiction. Section 3 (g) allows the exercise of

---

[5] In *Hughs v. Cole*, 572 N.W.2d 747 (Minn.Ct.App.1997), the Court of Appeals of Minnesota held that in an action brought on behalf of a child for an abuse prevention order, a Minnesota court could assert personal jurisdiction over the father in Pennsylvania based on the presence of the child in Minnesota and the fact that the child suffered emotional injuries in Minnesota stemming from abuse that had occurred in Pennsylvania. As far as we can ascertain, no other jurisdiction has concluded that personal jurisdiction may be premised solely on the emotional sequelae suffered by a plaintiff in the forum State on account of a wrong committed in another State. We choose not to follow the court's reasoning in the *Hughs* case.

personal jurisdiction over a person who maintains "a domicile in this [C]ommonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim." G.L. c. 223A, § 3 (g). The plaintiff's claim for a protective order is not one of the types of claims listed in § 3 (g). Nor does the presence of a claim for custody confer personal jurisdiction over the defendant with respect to a protective order merely because the two claims are presented in the same document.[6] The plaintiff does not point to any other provisions in the long-arm statute that might apply in this case, and none appears to fit the circumstances presented. There is, therefore, no reason to consider whether the exercise of personal jurisdiction over the defendant would fall within the

---

[6] The plaintiff also argues that jurisdiction can be found in G.L. c. 209D, § 2-201(5) (Massachusetts Uniform Interstate Family Support Act), which provides personal jurisdiction over a nonresident individual "[i]n a proceeding to establish, enforce, or modify a support order" if a child "resides in the [C]ommonwealth as a result of the acts or directives of the individual." We need not decide whether this provision would have provided jurisdiction for a support order in this case because the court did not issue such an order. General Laws c. 209D, § 2-201, does not provide jurisdiction for abuse prevention orders, and as in the case of custody, the presence of a request for support does not confer personal jurisdiction over the defendant with respect to a protective order merely because the two claims are presented in the same document.

minimum contacts standard required by the due process clause of the United States Constitution.

b. Status determination. Our conclusion that the District Court lacked personal jurisdiction over the defendant does not end the inquiry. It is established that a court may adjudicate matters involving the status of the relationship between multiple parties even where personal jurisdiction over all of the parties is not established. *See Pennoyer v. Neff*, 95 U.S. 714, 722, 734-735 (1877) (recognizing that State has authority to determine civil status of its citizen with respect to that citizen's relationship to a nonresident). This authority stems from a State's "rightful and legitimate concern" in the status of "persons domiciled within its borders," a concern that is no less legitimate because that status might also affect a person outside of the State. *Williams v. North Carolina*, 317 U.S. 287, 298-299 (1942). For example, a State court may grant a divorce to a spouse domiciled within that State without violating the due process rights of an absent spouse over whom it does not have jurisdiction. See *id.*; Restatement (Second) of Conflict of Laws § 71 (1971) ("[S]tate has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state"). This court, too, has recognized that due process is not violated because a court adjudicates certain matters relating to the marriage or divorce of an in-State spouse, including "the incidents of the status of marriage" and the "care, custody and maintenance of minor children," even though the

court lacks personal jurisdiction over the out-of-State spouse. *Wiley v. Wiley*, 328 Mass. 348, 349 (1952).

The authority of a court in such matters is not limited to declarations relating to marriage. Under G.L. c. 209B, § 2 (a) (3) (Massachusetts Child Custody Jurisdiction Act), "a Massachusetts court can award temporary emergency custody of a child to a parent fleeing to Massachusetts from an allegedly abusive situation in another State, thereby acting without personal jurisdiction over the out-of-State parent." *Lamarche v. Lussier*, 65 Mass.App.Ct. 887, 894 n. 13 (2006). See *Umina v. Malbica*, 27 Mass.App.Ct. 351, 358-359 (1989). Such custody orders comport with due process although the absent parent has no contact with the forum State, provided that the orders are limited to a determination of the child's custodial status within the State. This status exception to the personal jurisdiction ordinarily required by due process reflects the importance of a State's interest in the protection of offspring within its borders. *Bartsch v. Bartsch*, 636 N.W.2d 3, 7 (Iowa 2001), quoting *Williams v. North Carolina*, 317 U.S. at 298-299.

A court order that prohibits the defendant from abusing the plaintiff and orders him to have no contact with and to stay away from her-provisions that appear in the abuse prevention order issued in this case-serves a role analogous to custody or marital determinations, except that the order focuses on the plaintiff's protected status rather than her marital or parental status. Such an order furthers

the Commonwealth's important public policy goal of securing "the fundamental human right to be protected from the devastating impact of family violence," *Champagne v. Champagne*, 429 Mass. 324, 327 (1999); *Mitchell v. Mitchell*, 62 Mass.App.Ct. 769, 772-773 (2005), by declaring the protected status of a person who is currently domiciled in this Commonwealth after coming here to escape from abuse. As the Supreme Court of Iowa observed, "[i]f a court may constitutionally make orders affecting marriage, custody, and parental rights without personal jurisdiction of a defendant, it certainly should be able to do what the court did here-enter an order protecting a resident ... family from abuse." *Bartsch v. Bartsch*, 636 N.W.2d at 10. If this were not so, the unpalatable choices remaining are either to require the victim of abuse to return to the State in which the abuse occurred in order to obtain an effective abuse prevention order or, alternatively, to wait for the abuser to follow the victim to the Commonwealth and, in the event of a new incident of abuse, for the victim to seek an order from a Massachusetts court. In neither alternative will a court be able to provide protection to those within its borders. See *Lamarche v. Lussier*, 65 Mass.App.Ct. at 894 n. 13.

Due process considerations do impose limits on such status determinations. See *Williams v. North Carolina*, 317 U.S. at 299. First, any order must provide the defendant with reasonable notice and an opportunity to be heard. See *Milliken v. Meyer*, 311

U.S. 457, 463 (1940). Second, "[i]t has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant." *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978).[7] See *Wiley v. Wiley*, 328 Mass. At 349, 351 (order determining separate status of wife and custody of children without personal jurisdiction over other spouse cannot order payment of money). Accordingly, a valid abuse prevention order issued without personal jurisdiction cannot impose any personal obligations on a defendant, and is limited to prohibiting actions of the defendant. See *Shah v. Shah*, 184 N.J. 125, 139 (2005). The limitation prevents a court from issuing any affirmative order in which it attempts to "exercise its coercive power to compel action by a defendant." *Spencer v. Spencer*, 191 S.W.3d 14, 18 (Ky.Ct.App.2006), citing *Shah v. Shah, supra*, at 138.

---

[7] *Kulko v. Superior Court*, 436 U.S. 84 (1978) involved a husband and wife who had both been domiciled in New York State while married. They separated, and the wife moved to California, where she was later joined by the couple's two minor children. The wife sought and obtained from the California Superior Court an order awarding her custody over the children and an increase in the husband's child support obligations. The husband did not contest the custody order, but challenged the court's personal jurisdiction to enter the child support order. The Court held that in view of the husband's lack of meaningful contacts with California, that State could not exercise personal jurisdiction over the husband, and accordingly the California court lacked authority to order him to pay increased child support. *Id.* at 91, 100-101.

A prohibitory abuse prevention order admittedly is not the same as a status determination made in custody or divorce cases because, while the orders in such cases principally focus on the plaintiff, an abuse prevention order is primarily addressed to the defendant. But, as this court has recognized for over fifty years, an order that is appropriately limited to prohibitions that relate to the protected status of a person within the Commonwealth does not violate the due process rights of a nonresident defendant just because it issues without personal jurisdiction over that defendant.[8] See *Wiley v. Wiley*, 328 Mass. at 349, 351 (affirming jurisdiction of Massachusetts court, if either party is domiciled in State, to enter order determining separate status of wife and prohibiting husband "from imposing any restraint upon the personal liberty" of wife).

---

[8] The constitutional concerns raised by such an order are not limited to due process. Although a State always has a right to enforce its own laws within its borders, *Williams v. North Carolina*, 317 U.S. 287, 298-299 (1942), in order to issue a status determination that is given full faith and credit in a foreign jurisdiction a court must have sufficient interest in the parties or the matter adjudicated. See *id.* at 297 ("Domicil of the plaintiff, immaterial to jurisdiction in a personal action, is recognized ... as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance"). The defendant does not claim that the plaintiff had not established a domicil in Massachusetts at the time she sought the abuse prevention order from the District Court.

The result we reach is one that other jurisdictions have adopted. In *Bartsch v. Bartsch*, 636 N.W.2d at 6, 7-10, the Supreme Court of Iowa held that "personal jurisdiction over a nonresident defendant is not required for a court to enter an order preserving the protected status afforded Iowa residents" under that State's domestic abuse statute allowing protective orders. Similarly, in *Shah v. Shah*, 184 N.J. at 138, the Supreme Court of New Jersey held that under its domestic violence statute a New Jersey court could enter a protective restraining order against a defendant over whom it had no personal jurisdiction "to the extent it prohibited certain actions by defendant in New Jersey." The *Shah* court held that such an order could not impose any affirmative obligations on the defendant, such as requiring the payment of money or handing over documents, without violating the defendant's due process rights. See *id.* at 140-141. See also *Spencer v. Spencer*, 191 S.W.3d 14, 19 (Ky.Ct.App.2006) (status exception allows protective order against nonresident defendant limited to prohibiting contact with plaintiff). But see *T.L. v. W.L.*, 820 A.2d 506 (Del.Fam.Ct.2003) (status exception did not allow protective order against nonresident defendant).

The greater part of the order at issue in this case falls within the limits imposed by due process.[9] The

---

[9] The order in this case included an order to compensate the plaintiff in an "am't to be ordered" at a later hearing, but no amount was ever specified. Although the issue is not before us here, such an order to pay compensation would probably extend

defendant does not argue that he was denied reasonable notice or an opportunity to be heard, nor could he, because he was personally served in Florida with a notice of the order and a hearing was held (in Massachusetts) at which his attorney appeared. The order's prohibition against the defendant's abusing, contacting, or approaching the plaintiff or their child contains no affirmative obligation, and therefore it does not require personal jurisdiction. The defendant does not contest the District Court's jurisdiction to grant custody of the child to the plaintiff, but even if he did, jurisdiction can be found in G.L. c. 209B, § 2 (a) (3), which allows the exercise of jurisdiction for purposes of determining emergency custody of a child present in the Commonwealth. See *Lamarche v. Lussier*, 65 Mass.App.Ct. 887, 894 n. 13, citing *Umina v. Malbica*, 27 Mass.App.Ct. 351, 359 (1989). However, that portion of the order that requires the defendant to surrender his firearms imposes an affirmative duty. Such an obligation may only be imposed by a court with personal jurisdiction over the defendant, and accordingly, that portion of the order is invalid.

3. Conclusion. So much of the abuse prevention order that orders the defendant not to abuse the plaintiff, not to contact the plaintiff, to stay away from the plaintiff and the plaintiff's residence, grants custody of the child to the plaintiff and that orders

---

beyond the permissible scope of a status determination issued without personal jurisdiction. See *Kulko v. Superior Court*, 436 U.S. at 91.

the defendant not to contact and to stay away from the child is affirmed; so much of the abuse prevention order that orders the defendant to compensate the plaintiff and surrender firearms is vacated.

So ordered.